IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35624

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 503**
	)	
Plaintiff-Respondent,	)	**Filed: June 18, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
MICHAEL K. DANN,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Peter D. McDermott, District Judge.

Order denying I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

Before LANSING, Chief Judge, GUTIERREZ, Judge
and GRATTON, Judge

PER CURIAM

Michael K. Dann was charged with and pled guilty to lewd conduct with a child under sixteen, I.C. § 18-1508, and was sentenced to a unified term of fifteen years, with five years determinate. Dann filed an Idaho Criminal Rule 35 motion for reduction of sentence and a motion for a psychological evaluation, which the district court denied. Dann appeals, contending that the district court abused its discretion by denying his Rule 35 motion and by denying his request for a psychological evaluation for consideration in conjunction with his Rule 35 motion.

A Rule 35 motion is a request for leniency which is addressed to the sound discretion of the sentencing court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information

subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007).

The decision whether to grant a motion for a psychological evaluation, filed in support of a Rule 35 motion, is discretionary on the part of the district court and is governed by the same considerations as a similar motion filed prior to sentencing pursuant to I.C. § 19-2522. *State v. Izaguirre*, 145 Idaho 820, 823, 186 P.3d 676, 679 (Ct. App. 2008). Idaho Criminal Rule 32(d) provides: "The presentence investigator may recommend a psychological evaluation, but the decision as to whether to order a psychological evaluation is to be made by the sentencing judge. *See also*, I.C. § 19-2522(1); *State v. Jones*, 132 Idaho 439, 442, 974 P.2d 85, 88 (Ct. App. 1999). An appellate court will uphold the district court's decision not to order an evaluation if the record supports a finding that there was no reason to believe that the defendant's mental condition would be a significant factor at sentencing. *State v. Craner*, 137 Idaho 188, 189, 45 P.3d 844, 845 (Ct. App. 2002).

It is within the discretion of the district court whether or not to hold a hearing on a defendant's Rule 35 motion. I.C.R. 35; *State v. Arambula*, 97 Idaho 627, 550 P.2d 130 (1976). While Idaho has not recognized that a defendant has a constitutional right to be present at a hearing on his Rule 35 motion, holding a hearing in the absence of the defendant, and in the absence of counsel for the defendant, calls into question the validity of the hearing itself. *See State v. James*, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986) (finding that the defendant was not deprived of any constitutional rights by not being allowed to be present during his Rule 35 hearing because the hearing occurred after he had been present during sentencing, his counsel was present and there was no allegation that counsel did not present pertinent information to the court).

Unless an error affects the substantial rights of the parties, it should be disregarded. I.C.R. 52; *State v. Sandoval-Tena*, 138 Idaho 908, 911, 71 P.3d 1055, 1058 (2003). "An appellant has the burden to show prejudicial error, and absent such a showing, error will be deemed harmless." *State v. Rodriquez*, 106 Idaho 30, 33, 674 P.2d 1029, 1032 (Ct. App. 1983) (citing *State v. Ellis*, 99 Idaho 606, 586 P.2d 1050 (1978)). We conclude it was harmless error for the district court to conduct the hearing on Dann's Rule 35 motion in his absence because he did not request a hearing on the motion nor notify the court that he had evidence to present at a

hearing. Dann had presented the court with extensive written points and authority in support of his request for a psychological evaluation and for reconsideration of his sentence.

Applying the foregoing standards and having reviewed the record, we conclude that the district court did not abuse its discretion by denying Dann's Rule 35 motion for reduction of sentence and motion for a psychological evaluation. Accordingly, the order of the district court denying Dann's Rule 35 motion is affirmed.